Northern Ireland
Assembly

PUBLIC ACCOUNTS COMMITTEE

OFFICIAL REPORT
(Hansard)

‘The Administration and Management of the Disability Living Allowance Reconsideration and Appeals Process’

21 October 2010

NORTHERN IRELAND ASSEMBLY

PUBLIC ACCOUNTS COMMITTEE

'The Administration and Management of the Disability Living Allowance Reconsideration and Appeals Process'

21 October 2010

Members present for all or part of the proceedings:
Mr Paul Maskey (Chairperson)
Mr Roy Beggs (Deputy Chairperson)
Mr Gregory Campbell
Mr Patsy McGlone
Mr Mitchel McLaughlin
Mr Stephen Moutray
Ms Dawn Purvis

Witness:
Mr Conall MacLynn) President of the Appeals Tribunal

Also in attendance:
Mr Kieran Donnelly) Comptroller and Auditor General
Ms Fiona Hamill) Treasury Officer of Accounts

The Chairperson (Mr P Maskey):

Mr Conall MacLynn, the President of the Appeals Tribunal, is here to respond to the Committee's questions. You are very welcome to today's meeting. The usual procedure is for me to set the scene by asking a number of questions, after which I will pass to other members.

This is the second session on the Audit Office's report, 'The Administration and Management of the Disability Living Allowance Reconsideration and Appeals Process', the first having taken

place last week. We shall begin by looking at paragraphs 2.34 and 2.35. According to paragraph 2.35, you have been monitoring a pilot process for alternative dispute resolution in GB.

What are the outcomes from the pilot scheme and what would be the advantages of introducing a similar process here?

Mr Conall MacLynn (Department for Social Development):
Good afternoon and thank you very much for the invitation. The pilot scheme in Great Britain was conducted under the control of tribunal Judge Jeremy Bennett from London. Circumstances in Great Britain are different to those in Northern Ireland. For example, the success rate for disability living allowance (DLA) appeals in Great Britain is approaching 50% whereas in Northern Ireland it is considerably lower.

There was a feeling among colleagues in Great Britain that there had been a failure to consider with sufficient care the evidence presented to DLA offices. The aim of the project was to avoid unnecessary appeal hearings in view of the very high level of success. Consequently, a project was set up whereby when papers were received they were put immediately before a tribunal judge, and he assessed whether there should be an allowance. If he took that view, he made direct contact with the decision-maker in the Department to suggest that an award might be made. If the decision-maker agreed with the recommendation, the suggested award was communicated to the claimant, who was asked whether he wanted to continue with his appeal. The project was carried out over about four months in areas around London, in an area in south Wales and in Scotland.

Although the results were quite encouraging, in that they managed to dispose of a fair number of appeals, the difficulty was that the total cost of doing so was not terribly different to taking the appeals to hearing. Therefore, the new chief executive of the appeals service in Great Britain took the view that, because there was no obvious monetary saving, he would not proceed with the project.

That said, issues here seem to involve more than money. For instance, I would like to see fewer people having to experience a full hearing before a tribunal. I would like alternative dispute resolution to be attempted in Northern Ireland, but we should go about it in perhaps a slightly different way. In the past, I have asked the Department to make available a senior

officer, with knowledge of cases, who Assembly Members or other representatives could contact to see whether an agreement could be made about an appeal. Presently, when papers are sent to an appellant, the covering letter simply encloses the papers but does not give the appellant details of the officer who might be in charge of the case. Looking at the submission that was prepared by the Department, the appeal writer has a name attached to the end of it. This morning, I spoke to the head of the disability and carers service, Lesley Morgan, who said that if a representative contacts the service and explains that he or she wishes to speak to the appeals writer, contact can be made with that member of staff to discuss the case. Such mechanisms are probably an economic way of solving the dispute between the claimant, their representative and the Department. It could be a good way of exploring those issues.

I emphasised in my response to the report that there should be far greater attendance by presenting officers. I have been having an ongoing battle with the Department about that for the past nine or 10 years. I would like the Department to go much further and not only have presenting officers but have them at the hearing. They could make an immediate agreement with the appellant and/or their representative about an award, if possible, so that the case is removed from the tribunal altogether. As things stand currently, there has to be a hearing on every appeal unless the appeal is withdrawn. A good presenting officer will make a concession to the tribunal, which is sometimes very helpful. However, it does not relieve the tribunal of the obligation of conducting a hearing. If nominated officers were there with responsibility for cases and could, in effect, settle the case, that would relieve the anxiety of a substantial number of appellants.

The Chairperson:

What has been the Department's response to those issues?

Mr MacLynn:

The Department is very reluctant to give presenting officers the power to make decisions on the day of the hearing.

I do not quite understand why that is; you would have to discuss that with the Department. On the day of the hearing in Northern Ireland we normally have additional evidence available. Of course, we also have the appellant there, who can explain his or her problems more fully, but it is practice in Northern Ireland for medical records to be available as well. That additional block of evidence is very important.

In my survey of the standards of departmental decision-making, I conceded that the Department has a very high standard of decision-making on the basis of the evidence available to it. The problem is that when it comes to a tribunal we have additional evidence available, both through the medical records and through hearing the direct oral testimony of the appellant. That fact gives rise to a considerable number of allowances. It seems to me that if an officer from the Department was there and who could deal with the case on the spot, having seen the additional medical evidence and perhaps had an opportunity to have a discussion with the representative and the appellant, it might be possible to reduce the number of cases that have to go on for a hearing.

The Chairperson:

That would obviously speed the procedure up as well, I would imagine. Can you give a time frame for that?

Mr MacLynn:

I am not necessarily arguing that there are direct financial savings to be made. When the permanent secretary gave evidence last week I think he made the point that all the money is spent by the time a case gets to tribunal. That may be so, but I would like to try to relieve the pressure on appellants themselves and to relieve them of the necessity of having to go through what can be a very detailed hearing. We should be able to list more cases if that approach is taken, because the success rate at appeal level is between 28% and 30%, which represents a fair number of cases. At the moment, we are dealing with around 9,500 appeals in total per year, which is not an insignificant number. I think there is room for progress there and to try to assist appellants through the system.

Mr McGlone:

It is good to see you, Mr MacLynn. We do a fair amount of advocacy work in tribunals and the like, and my experience is that when the presenting officer does not show, despite probably the best will of the panel, it alters the dynamics of the panel. The panel then almost has to become a devil's advocate or a proxy for the Department. Perhaps I am saying that incorrectly — not a proxy for the Department, but the panel has to explore all aspects of the case before it to its ultimate satisfaction, whereas, if the presenting officer were there, he or she could do that on behalf of the Department. I am not saying that they would not do it, or that the panel is not fulfilling the role otherwise, but I find that the dynamics of the room change when the presenting officer is not there.

Mr MacLynn:

I agree; it has always been a concern of mine that the public perceives the tribunal as doing the Department's job for it. That is manifested by the comments that appellants often make when they say that "you people" have done such and such. They seem to think that the tribunal is part of the mechanism of dealing with cases within the Department, and I am concerned about that. It interferes with the apparent independence of the tribunal.

Mr McGlone:

Although the panel is working professionally, and in the vast majority of cases I would not have any great complaints about it, I often wonder if that is being done to obviate the necessity of the Department then taking it to the commissioner — in other words, to show that all avenues have been covered, every box has been ticked and all aspects of evidence have been accepted and received as they should be in order to avoid the social security commissioner coming down the line, if the Department chooses to go that route.

Mr MacLynn:

There might be an element of that involved, but the tribunal still has an overall obligation to deal with all issues arising in the appeal. The Northern Ireland Court of Appeal made a decision in the Mongan case, when it ruled that, regardless of what a representative says — whether a representative of the Department or the appellant — the tribunal still has to deal with all the issues that arise in the case. I do not think there is any Machiavellian plan of any kind involved. We did get an increasing degree of representation when I pressed the issue somewhat some years ago, and now it has fallen back again.

I think that members of the public are disquieted because they expect the departmental representative to be there. They think that, if they have an appeal, there should be somebody from the Department to answer their queries, and, if there is no such representative there — as is normally the case — I think the public are dissatisfied with the appeals system.

The Chairperson:

OK, thank you. Paragraph 2.4 states that you see some merit in establishing a formalised arrangement or public service standard with the appeals service. What do you consider to be the difference between a service level agreement and a public service standard-type document, and

what steps have you taken to bring that change about?

Mr MacLynn:

The report sets out that a service level agreement is to help to resolve disputes between two bodies, and to make the working relationship work better. The report raises a number of other issues about service level agreements.

My problem is that our tribunals are defined totally by the decision-making appeals rules. We have to follow those rules. That is the nature of the relationship between the tribunal and the public. Because I and all the members of the tribunal are essentially judges, we have to progress cases on as fair a basis as possible, but based on the regulations of tribunal procedure.

So, the tribunal rules of procedure fix the relationship between the tribunal and members of the public. For example, under those rules, we have to make a record of the proceedings, and make that available to the public if requested. We have to give reasons for our decision. We have to take into account setting aside applications, correction applications, and applications for leave to appeal. The chairman can make directions for the disposal of an appeal. So, the entire rubric of what the tribunal does is specified in the appeals regulations. In a sense, that defines the relationship between the parties and between the parties and the tribunal.

My problem is that a service level agreement is an administrative arrangement that is established for a totally different purpose. It is totally appropriate for that to exist between different administrative bodies, or between public bodies and members of the public, if that happens to be the case. From the adjudication point of view, however, from the point of view of an independent judicial body, I cannot impose procedures on tribunals themselves. Tribunals have to follow their own procedures, and follow the appeals rules. So, there is no agreement that I can enter into that would in any way bind a tribunal, and neither should it.

On the other hand, however, with regard to public service, I and the members of the tribunal are concerned that there should be proper levels of accommodation. I am concerned that I should be able to discuss problems arising at tribunal level with officials in the Department, and perhaps try to resolve those problems.

For example, there are ongoing discussions all the time about the content of submissions, how

much information is contained in a submission, and the amount of work that the Department would do to produce a useful submission for the members of the tribunal, and for the public appearing before the tribunal. There are regular ongoing negotiations about that sort of thing.

There is also the issue of how long it takes for the Department to provide a submission for the tribunal. I have, perhaps, to make my position clear, because it is a name that I have and is one that I have to follow fairly rigorously. I had discussions about that with the Lord Chief Justice, and he made it quite clear that in judicial bodies, it should be the head of the judiciary who fixes the targets for the clearance of judicial work.

I have been frustrated in doing that in Northern Ireland, because the Department will not tell me when an appeal has been made. So, I have no way of controlling the amount of time that a Department takes to produce a submission to the tribunal. In the past, the administration of tribunals was in the control of the Department, which means that one of the parties to the appeal controlled the administration.

One reason I got quite concerned about the report was because it said that the relationships set up in the service level agreement between the administration of tribunals and the Departments preparing submissions was a satisfactory arrangement. From my point of view, that was not a satisfactory arrangement at all, because it was simply one part of the Department talking to another part of the Department to set up procedures that suited their internal administrative arrangements. That has started to change in that the administration of the tribunals through the reform package has now transferred to the Courts and Tribunals Service, so the administration of tribunals is now one step back from the Department if you like, and that is a very positive development. The other side of the coin, however, is for me to be advised when an appeal is made.

Once that jigsaw puzzle is put together, I will then fix targets for the Department to produce papers for the tribunal and take steps if that is not done timeously. I will also fix targets for the listing of appeals once the appeal documents are received by the tribunal. Taking in all of that context, talking about service level agreements is relevant in a sense, but there are different kinds of arrangements that have to be made because you are dealing with a judicial body and not with two administrative bodies.

The Chairperson:

Is there any reason why you are not being advised when an appeal is made?

Mr MacLynn:

You might well ask. I have been pressing the Department to do that for the last 10 years. I administered tribunals and set those targets until 1999, when the tribunals system was reformed, both here and in Great Britain. There was a constitutional problem, which I accept was real, relating to whether a member of the judiciary can be an account holder and be accountable to Parliament for the incurring of expenditure. There really was no satisfactory answer to that, so the administration of tribunals was transferred back to departmental officials, and has now been passed on to officials from what was formally known as the Courts Service.

In the process of that change, the Department took the opportunity of taking back control of the appeal process between the date that the appeal is made and the date of the preparation of the papers. The change was quite dramatic. When I had control of the administration, my target for the first listing of DLA appeals was 12 weeks. Within two years of the Department taking over administration, the delay in listing had stretched to eight or nine months. That demonstrates what happened in those circumstances, so I hope that we can step back from that somewhat when the administration arrangements are reformed.

Mr Campbell:

I was going to ask about presenting officers, but I think you have dealt with that. The other issue is a more generic one relating to the presentation of your report, the delay and how you plan to ensure, presumably, that there is no delay in the future. What is the reason for the delay, and what will be done to eliminate it in the future?

Mr MacLynn:

The delay is simply a systemic problem. What we do at the moment is take a calendar year and do a statistical selection of the cases that are heard during that year. In order to assess the standard of decision-making, the cases have to finish their progress through the system. For example, with the latest report we produced, which was for 2008-09, although we stopped selecting the cases in April 2009, the final cases may not have been decided until October or December 2009. My office then has to collate all of the responses throughout all of the benefits that we are dealing with, check all the responses that we receive from tribunals, and then prepare

the report. In this particular instance, the report was given to the Department around four or five weeks ago.

I accept that that process will have to be quickened. As I think I set out in the report, my colleagues in Britain have an advantage in that they have 80 full-time chairmen; I have one. Eighty full-time chairmen can do a photo shoot, as it were, of all the cases heard in one particular day, whereas I cannot organise that in Northern Ireland because of the nature of our structure. What I am doing is looking at the system with statisticians to see whether we can adjust the targets and not necessarily select cases for the full twelve months, but perhaps select cases for nine months, try to get those dealt with as quickly as possible and then put them into the statistical analysis.

I should say, to be fair to the Department, that the standard of decision-making in DLA at a departmental level is in fact very high, as the report indicates. We are talking about percentages between 0% and 4·2%, which is a very high level of decision-making on a statistical basis. I would not rule out leaving DLA out altogether and concentrating on some of the other benefits where there are more serious problems, and perhaps in that way speed up the consideration of the cases to bring forward the dates. I am certainly open to doing that, and I will try to bring it forward as much as I possibly can.

Mr Campbell:
If you did almost discount DLA altogether, would that then leave you open to criticism that you had simply avoided dealing with it?

Mr MacLynn:
It could do, except that there has now been a three- or four-year period where the results have been very good each year. I could ask Mr Campbell a question: if a Department is performing at a high level, do we need to monitor it every year or should we do that every other year? DLA makes up about half of our workload, so that can make quite a difference. However, I have an open mind about that, but I am quite prepared to consider anything that will bring the report forward.

Mr Moutray:
Paragraph 2.40 deals with the appellant satisfaction survey of November 2007. Given that 75%

of appellants found the experience of an appeal stressful and 31% claimed that they would not advise anyone else to lodge an appeal, what actions have you taken to improve the experience since that date, and have you continued to carry out those surveys?

Mr MacLynn:

Yes. The survey is not statistically valid. We simply carried out regular surveys in my own office. We did another one after that, and that percentage figure has dropped to about 28%. It is not a very accurate figure, but it is recognition of a serious problem, and I accept that it is a serious problem. The difficulty is that, when we deal with a group of people who are dissatisfied with the outcome of their appeal — for example, 70% of appeals on DLA are unsuccessful — those people will then question whether or not it was worth their while appealing. Some people say that, if they do not get any more money, there is no point in the appeal, because the tribunal simply upheld the Department's decision.

We take steps to try to reassure people that that is not the case and that we look at their appeals very carefully. However, from that point of view, we have to put our information in the public domain very carefully because it is absolutely pointless giving people false hope about an appeal. If a case has been decided perfectly properly and it goes before a tribunal, it is not very helpful to tell people that we will consider their appeal with great care and that there is a real possibility of success. That is not the case. We have to evolve some way to get across to the public that they have the right to appeal and that they can query how the appeal is dealt with. However, that will not necessarily give rise to a better result. That is quite a challenge.

Mr McGlone:

It would be remiss of me not to raise the concerns that my colleague John Dallat had last week about the stress that arises because of the location of an appeal.

Mr MacLynn:

What do you mean by location?

Mr McGlone:

I mean the centre in which the appeal is heard. Mr Dallat gave an example of Coleraine courthouse. The issue was that people were brought there during, at least, a couple of very high profile criminal cases, one of which may have even involved a murder. From my own experience

with appellants, I know that most of them get pretty worked up anyway if they have not faced a tribunal before. Most of them have not done that before. Therefore, there is stress involved in going into a quasi-judicial environment — it might only be a room, which is pretty informal anyway — to see loads of police and prison officers, and people being taken away in handcuffs. That may happen only once in a blue moon, but once in a blue moon is probably too often for some people, some of whose appeals may even be about stress-related problems. Have you given any deliberation or a wee bit of thought as to how to circumvent that and to make the surroundings for hearings a bit more pleasant or neutral?

Mr MacLynn:

We avoided courthouses altogether until very recently. We very rarely use courthouses. Our main anxiety was to try to provide a local service for people, and, as the Committee probably knows, we have tribunal hearings in 16 centres throughout Northern Ireland, aside from our full-time centres. Therefore, to some extent, using centres outside our full-time centres always involves a degree of compromise on location, ease of use, and so on. We have used the town hall in Coleraine quite a bit. It is a suitable location right in the centre of the town, and people have no hesitation in going there. I have an open mind about courthouses. I agree that if other court proceedings are on, it is very unnerving for members of the public to go there. That should not happen.

Siobhan Broderick from the Courts and Tribunals Service, who is now in charge of running tribunals, was here last week giving evidence. She has concerns about making optimum use of court buildings for reasons of economy. Although I can understand those arguments, particularly in the day and age in which we find ourselves, I think that it is important to avoid sitting days. I have no hesitation in saying that, and I agree that it gives entirely the wrong message to members of the public who, after all, are simply asking for their benefit calculations to be checked and properly assessed. I think you are right about that.

Mr Campbell:

In relation to the survey, you said that it is not really that scientific. Is there any point in continuing with surveys like that? If the majority of people going through the appeals procedure are being rejected, the chances are that they will find it stressful. It is a bit like 100 people applying for a job and you survey the 99 who do not get it. They would probably say that it is quite stressful, because they did not get the job. Is there much point in doing that? What is the

benefit of it?

Mr MacLynn:

I think we could do a statistical survey, which would be a lot more helpful. My view is that we should at least ask the views of people who attend hearings or give them a chance to express their views as to what difficulties they find, what is positive and what is negative. In this particular case I think we issued around 150 enquiry forms to appellants attending hearings in Belfast over around a one-month period. I think we had around 50 or 55 responses. That is why I say that it is not a statistically based, reliable survey. On the other hand, it does give us a feel for what people are concerned about and gives them an opportunity to comment. It would obviously be much more valuable to do it on a statistical basis but, as you rightly point out, a high percentage of people do not have success with appeals, and a survey will probably get a negative response from those people.

However, there is an argument — and I think it is an important issue — that people should have confidence in the system and should not hesitate to use it. If the frustration about getting an adverse decision is a significant matter, it may mean that we need to speak to people in a different way and try to get across to them that, win or lose, we want to hear what they have to say.

Mr Moutray:

There are 160-odd tribunal members and tribunal hearings taking place at 18 different venues. How content are you that there is a consistency of approach and decision-making across the Province?

Mr MacLynn:

Of course, it is not part of my responsibility to check consistency. My responsibility is to provide proper training for tribunal members.

Mr Moutray:

How do you monitor it?

Mr MacLynn:

I do not have a statutory obligation to monitor it, so I do not. It is the appellant system that checks the standard of decision-making, because each tribunal is entirely independent and has to

deal with the case before it in a proper way. I do, of course, look very carefully at all the cases that go before the commissioners and at the commissioners' decisions. If I identify a training need at that level then that is something that I certainly take on board.

In our training sessions there is a degree of monitoring, in that we have a look at and discuss individual cases and the law that applies to cases coming before tribunals. Through that process of consultation with the members in a training context we can identify difficulties that people are having and in discussions with the entire group together we can pick up inconsistencies, as we do from time to time. In relation to matters of quality control, I have to be very careful not to be seen to be interfering with the individual decisions of tribunals, and I have to stand back from any direct involvement in that sense.

Mr Beggs:

Who monitors whether one of the nine groups is being under-generous or overly generous in its decisions? In one area, there may be a very high success rate for appeals and in another area there might be a very low rate. Is anybody monitoring it?

Mr MacLynn:

No, it is not directly monitored, because they are all individual, independent bodies. In the other court systems, whether it is County Court, Magistrates' Court or the High Court, a certain amount of guidance emanates centrally, for example, on sentencing policy. The judges issue guidelines on that. I think that a certain amount of discussion goes on about the level of damages awarded in the High Court for example, or in the county courts. It is the same in criminal injuries procedures.

In our system, however, we are dealing with entitlements on the basis of the legal rules that we apply. We try to have consistent application of the rules on the basis of the evidence as it is interpreted by the members of the tribunal. Obviously, in each tribunal we have three members. With regard to judicial independence, it would not be right for me to interfere any further than that, and I do not do it.

Mr Beggs:

If it is not you, who would be monitoring whether there is inconsistency in decision-making between different panels?

Mr MacLynn:

At the end of the day, that should be looked after by the appellate system, in that if rules have not been applied properly, there is a right of appeal to the commissioners if there is an error of law.

Mr Beggs:

For instance, if one area has been overly generous, nobody will appeal. They will be happy.

Mr MacLynn:

The system is that each case is dealt with by a panel of three members, and there is not that comparison.

Mr Beggs:

Once a decision is made, it is very difficult to go back on it. How is a need for additional training highlighted?

Mr MacLynn:

Training arises out of changes in the law, application of the rules, and renewal training. As the law is evolving all the time, we have cases coming down demonstrating how various aspects of what we are doing should be interpreted. We have different sorts of cases developing where there are challenges to how those cases are dealt with.

In DLA training, for example, we would look at problematical areas of medicine from time to time, and we have run training courses on issues such as autistic spectrum disorder, chronic fatigue syndrome, and alcoholism. Those are the problem areas at the end of the day.

However, when you talk about tribunals being inconsistent with one other, there is also a slight misunderstanding involved there, if you will forgive me for saying so. There is no such thing as one individual tribunal. It is a permutation that is constantly changing. It is not all that common to have the same tribunal sitting at the same time in the same place, unless a case was brought back to them that they previously heard.

So, it is a constantly changing group of people. It is not as though it is one single decision-maker sitting in one area, and you can say that that one decision-maker sitting there is deciding

cases in a different way from another single decision-maker sitting somewhere else. It is a state of constant flux.

Mr Beggs:

Do members express a preference for joining panels that are a reasonable distance from their home, or are they happy to travel from Newry to Coleraine? Is there not some geographical linkage?

Mr MacLynn:

There is not a great deal of geographical trawl; it is more a willingness to travel.

Mr Beggs:

Figure nine on page 33 of the report shows the time it takes to complete the tribunal process, which varies from 16 to 23 weeks. I understand that the current target is 17 weeks. Why does it take so long, what is a reasonable time, and how could the process be shortened?

Mr MacLynn:

I have no administrative responsibilities at all. I do not run tribunals. The issue of putting tribunals on for hearings is entirely a matter for the Courts and Tribunals Service, and, before them, the appeals service. So, I do not have any direct control over those times, but we should try to put on tribunals as quickly as possible.

Those are departmental targets, and the outcomes have to be identified by administrators. However, the issue of how long it takes to list appeals, and the administrative backup, is entirely a matter for administrators. There are one or two difficulties in arranging hearings in that almost all our members work on a fee-paid sessional basis.

The only full-time members of the appeals tribunals are me and Mrs Edell Fitzpatrick, who are full-time legal members. Everyone else works part time and is fee-paid. The administrators send out a calendar to our part-time members and ask them to indicate their availability. The calendar is then returned, and sessions are allocated based on availability. Those sessions are then sent out to the members who have been selected to ask them to confirm whether or not they are available on those days. For example, at today's date, the calendar has been sent out for January, and, once the January sittings are fixed by administrators, my understanding is that the arrangements for

sittings will go out in the final week of November or in the first week of December, approximately six weeks before the sittings start.

It may or may not be that members are still available for all the dates that have been selected at that time. However, that gives the Committee an idea of how fixing dates is a complicated process when we are relying on fee-paid members to select their availability through a calendar system. Once we postpone or adjourn a case, that system means that it can take another two or months to relist it. We cannot simply allocate the case to the following week. We possibly need to look at that, and I want administrators to determine whether they can tighten up that process so that cases can be allocated without that kind of delay or, in other words, to select panels without necessarily selecting cases. However, as I say, I do not have direct responsibility for that, but I share Mr Beggs's concern that we need to tighten up the timescales as much as possible.

Mr Beggs:

The report shows that the percentage of tribunals that are postponed because of the unavailability of members has varied between 37% and 25%.

Mr MacLynn:

To be perfectly honest, I do not understand that figure. I have asked for details of that figure. I do not know where it comes from.

Mr Beggs:

Do you know the current figure?

Mr MacLynn:

Not only do I not know the current figure, I do not know where those figures came from.

Mr Beggs:

How could we find out?

Mr MacLynn:

The Audit Office could perhaps give some details on that.

Mr Beggs:

Who manages tribunals?

Mr MacLynn:

I do not. The administrators do that. I am at the judicial end of the process, not the administration end.

Mr Beggs:

I am trying to understand who is responsible.

Mr MacLynn:

Absolutely. Siobhan Broderick, as the head of current administration, is the correct person to answer that query.

Mr Beggs:

Perhaps we can write to her to get that information.

Mr MacLynn:

I agree; that is an alarming figure. However, I do not understand how it was put together.

Mr Beggs:

I will move to another area. DLA is a self-assessment benefit. I would have thought that it should be the responsibility of the claimant to provide medical evidence, because that is a key part of any claim to support statements that they make in an application. At the appeal stage, you have instructed the appeals service to request consent from applicants in all cases where their medical records have been made available. Why is that necessary, given that it does not happen in GB?

Mr MacLynn:

Self-assessment is departmental policy, not law. The rules of disability living allowance do not say that it is based on self-assessment. That is a departmental policy. The difference between self-assessment and non-self-assessment is the difference between, for example, employment and support allowance and incapacity benefit and disability living allowance. Those other benefits require compulsory medical examinations, and that is why it is not an issue of self-assessment. It

is entirely for the Department to decide what evidence it obtains to deal with a claim.

When we established disability living allowance in 1992, tribunals looked at the evidence that was made available and took the view that, in order to have a full understanding of the mobility problems and care needs of appellants, medical records would be extremely helpful. Therefore, I considered the situation and decided whether or not it was proper to request those records and how to do that. At the end of the day, I reached the conclusion that that was a matter for claimants themselves. In other words, I decided that it had to be a consent system that is based not only on the consent of the appellant but of the GP.

I set the system up at that time so that the claimant himself was given the opportunity to give his consent, if that is what he wanted to do. Equally, the GP would have to give his consent. We do not pay them; no fees are involved. It is driven purely by the consent of the appellants.

It is interesting that the system was opposed by the Department, and by Citizens Advice in Northern Ireland. The Law Centre in Belfast had concerns about it, and I listened to those concerns. The curious thing, however, is that the appellants drive it, and the appellants seem to expect us to have further information available from their GPs.

So, the system exists only because appellants want it to exist. If they simply did not give their consent, or were unhappy about giving their consent, that would be an end to the matter. In training tribunal members, I make it perfectly clear to them that no adverse inference of any kind should be drawn from the absence of medical records, and that they have an obligation to deal with a case purely on the evidence that is presented. That, in fact, is what they do.

If the doctor or patient/appellant has reservations, that is the end of the matter, and it is not taken further. That is why we train tribunals. It is simply an effort to make sure that we have as much information as the appellant is willing to give us about the problems that he suffers from, his medical condition and the care needs arising from that, and the mobility problems.

Mr McLaughlin:

Are you entirely agnostic about the value or helpfulness to the panel of medical evidence? Do you see any evidence in formalising a view about whether it helps the panel come to informed and just decisions, as opposed to, say, the appellant's choice?

Mr MacLynn:

The panels, and in discussions at training, are convinced that it enables us to make a better standard of decision. We are better informed, and have a better understanding of the appellant's medical condition.

Mr McLaughlin:

Has there been any view about validating or evaluating that so that we can have a policy response?

Mr MacLynn:

I am not sure. Again, Mr McLaughlin, we get back to each tribunal having the right to decide what evidence it will call for or take into consideration. I am not entirely sure whether if the administrative arrangements that we have in place were removed, tribunals would then start to adjourn on a regular basis for medical records. I suspect they possibly could.

It comes down to understanding a person's circumstances as well as we possibly can. You are quite right: they do not do that in Great Britain. They would not even attempt to do it, because the way that we do it in Northern Ireland is possible because of our small jurisdiction and the relatively small number of appeals.

I attach enormous importance to medical confidentiality. Because of that, we never ever make copies of the records. We ask for the records to be sent to us, they are dealt with on the day that they arrive, and are immediately sent back to the GP when we are finished with them. Representatives often say to me, "Can we not make a copy here, and keep copies, or can the Department have copies?" I dissuaded people from doing that, because I do not want multiple copies of very sensitive private medical records going anywhere if we can possibly avoid it.

That system is looked at very carefully, and confidentiality is paramount in running it. As I said, it does appear to be demanded by the claimants. They are not in any way pushed to do it. There is no pressure on them whatsoever. It is purely a consent system, and we seem to get the consent in over 70% of cases.

Mr McLaughlin:

I find supporting medical evidence very valuable in my constituency work. You were talking about the possibility of postponing hearings because of the unavailability of medical records. Circumstances that can arise with the appellant can equally arise if a panel member finds it difficult.

In making the calendar-based arrangements that you described, is an additional panel member identified to see if they can clear that date in the event that they are required at short notice? When dealing with the listing of appeal cases is an additional case identified that can be slotted in? If a person seeks an emergency appointment with a doctor, that works on the basis of using cancelled appointments productively, rather than simply allowing downtime to build in to the system and affect all sorts of lists. When taking a car for its MOT one can very often get an emergency appointment because someone else has cancelled. Have you considered those arrangements?

Mr MacLynn;

Those are matters that need further consideration, but it is fair to say that the administrators do try to fit people in if there is a cancellation; they say that they do that quite carefully. Our members do make efforts to make themselves available, if at all possible. It is a dilemma, because it is a very economical system to only pay people a fee as and when they sit, rather than having a large group of full-time people, with all the expenses involved in that. I think that, from the members' point of view, if he gives availability for 10 days but is only actually offered sittings for three days, that is the end of the matter, he simply gets the three days of sittings. There is also no guarantee, even if a member is offered a sitting day, that that sitting will occur. It might be postponed for some other reason. There are inherent difficulties of that kind in the system.

I will answer your other question about information. Some people opt to have their appeal dealt with on the papers and, if they do, those paper cases are slotted in when an opportunity arises at tribunal sessions.

Mr McGlone:

We talked about the need for the medical evidence; that is very useful, because it gives a much deeper insight into the person's condition and the history of the condition week-on-week. That brings me to another issue — you will probably say it relates to the administrative aspect —

which is the number of times appeals are adjourned because of the unavailability of medical records. There are practices that just will not release them, and they say that the reason for that is that medical records were once lost so they will not release them at all. There are others that say that it takes a wee while for the medical notes to come back again, and that they need those records so that a local doctor can quickly and easily look them up.

In most of those cases, such practices are genuine enough in their motivation; it is not that they are looking money for photocopying or anything like that. Usually the practice is that the appellant, or somebody acting on their behalf, picks the stuff up and leaves it back that day. Have you noticed, or has anything suggested to you, that the number of appeals being adjourned because of that has gone up, or is it static at a certain percentage? Is there a further issue there?

Mr MacLynn;

There are slightly different practices in different parts of the country among the medical profession. Administrators have adopted different practices about the return of medical records and the postal system they use, whether that is recorded delivery or ordinary post. I would like to reassure you about the loss of medical records. We have been getting medical records since 1992 and, to my knowledge, I think two or three sets of medical records have gone astray in all of that time. In two cases we found that it was the medical practice that lost the records. It is something that we have been able to keep to an absolute minimum, but, nevertheless, it is absolutely crucial that that does not happen.

One or two sets of records went astray when I was in charge of administration, and we assisted the doctors involved in reconstructing the medical records and made a payment for that purpose. Fortunately we were able to do it. I think that some doctors are apprehensive that if registered post is not used the records might go astray, but, as I said, in practice that has not really happened. There are also some doctors who have concerns about data protection, and there are one or two officers in the Western Trust who have expressed a concern about that. I do not think that is really a problem, because there is a requisite consent to deal with the medical records.

I have been told by administrators that records are returned immediately afterwards and that the period of retention is kept as short as possible. However, most practices now have computerised records, and we only get a printout of the record in that the actual information is retained in the computer system of the medical practice. Three or four different kinds of computer systems are in use, and they produce slightly different kinds of information. However, I think that the days of

the cardboard cover with handwritten records inside have practically come to an end.

Mr McGlone:

I am not so sure about that. Quite often, it is a combination of both. We get the printout for as far back as it goes, perhaps five or six years, and the rest is handwritten information that we have to try to decipher. Coincidentally, an appeal that my office dealt with on Tuesday had to be adjourned because officials could not make out the handwriting.

Mr MacLynn:

Handwriting is sometimes a problem.

Mr Beggs:

I have a final question about paragraph 3.45, which is about fee-paid members of the tribunals. The paragraph suggests that we almost rely on the goodwill of tribunal members to give additional time over that which is set out in their terms and conditions of appointment. The report indicates that about three hours of preparation time is required for a one-day session. Are members paid for those three hours? How are those people paid and at what hourly rate? Does the fee take into account the preparation work?

Mr MacLynn:

I hesitate to get into that in any detail because it is completely outside my responsibility. The question of fees is now a matter for the Courts and Tribunals Service, and fees are funded by the Department for Social Development.

However, I will outline what happens at present. The report sets out the level of fees that are paid on a daily basis. Some members are retained on half-day basis and may or may not get a full day. They are paid a fee for sitting on the day, and there is no additional payment for preparation or for any post-hearing work. If the reasons for the decision are requested subsequently, the legal member normally has to do that. Most of them do it at home in their own time. If there are applications to set aside the tribunal decision or adjournment applications or interlocutory applications, it may or may not be slotted into a hearing or the papers may be sent to the member's home. One fee is paid for each session when a member sits, but there are no fee arrangements for any further payments outside that.

Mr Beggs:

The Committee should pursue that issue. Is that the reason why people do not turn up at court 37% of the time?

Mr MacLynn:

I hope not.

Mr Beggs:

It is worthwhile pursuing whether that is an appropriate level of remuneration. If it is not, we need to find out why those people do not turn up. It is in the public interest to get to the bottom of those issues.

Ms Purvis:

I will return to the issue of presenting officers. You would like a presenting officer at every tribunal hearing, and that has a resource implication for the Department. Furthermore, you said that it would be beneficial if presenting officers could come to some agreement on cases. However, the contradiction is that, at the moment, the presenting officers do not have the authority to make that decision. Would it not be a better use of resources and presenting officers' time for your office and the agency to reach an agreement on which cases presenting officers should attend, given that presenting officers do not have the authority to make decisions on cases and that no alternative dispute resolution system is in place?

Would it not be better to agree specific types of cases that presenting officers should attend? Perhaps the resources saved from their non-attendance at other hearings could be used for a formalised ADR stage before tribunal?

Mr MacLynn:

It is quite interesting. There have been reforms in the past aimed at improving the system. In 1999 there was something called a second-tier review; I do not know if you recollect it or not. When the disability living allowance system was set up in 1992, there was a separate disability living allowance tribunal. However, if somebody wanted to go to the tribunal, they had to apply to the Department first to carry out a second-tier review, and only after that could the case go forward for appeal hearing. That is the reason that the report states that at one stage the number of DLA appeals suddenly jumped; that was because the reform system abolished the second-tier

review, and all cases went straight to appeal.

We could argue that the second-tier review system was actually quite efficient, because it was a formalised, internal way of looking at the case again and trying to see if it could be resolved at that stage. That did appear to reduce the number of appeals at that time, so it is something that could possibly be looked at.

On the question of selecting officers to appear, the difficulty is that all of those cases are complex. It is very difficult to say that an individual DLA appeal is a simple case, because we are dealing with a group of people who have complex health problems. There are almost always chronic health problems that have been going on for many years, and it is the effect of that chronic ill-health on the various levels of benefit. As one of the witnesses explained to you last week, there are eleven permutations involved; we are involved in three levels of care, two levels of mobility, and the interaction between those levels.

In relation to value, we are talking about potentially up to almost £6,000 a year, with open-ended awards in some cases that can go on for many years, so the value of awards is very high. If you combine complexity with value and the importance to appellants, it seems to me that there is a need for a good level of input from the Department in resolving those cases. DLA is now the most important maintenance benefit that people get. It is non-taxed and non-means-tested, it is substantial, and it makes an enormous difference to individual families. It is absolutely essential that it is got right.

I once did an valuation of a full-rate disability living allowance case and I reckoned that it was worth an award from the High Court in excess of £300,000 in capital. That is the kind of award for which income would have to be generated for the seriously disabled people who are claiming disability living allowance. For all of those reasons, it is important that the Department does put the resources into making sure that the level of benefit is right.

Ms Purvis:

Do you see any correlation between presenting officers appearing at hearings and, for example, a determination on behalf of the agency to fight an appeal, or a correlation between the non-attendance of presenting officers and an indication that the agency is prepared to let an appeal be overturned?

Mr MacLynn:

I cannot say that; I simply do not have the information to make a judgment of that kind. There was a suggestion last week by the chief executive of the agency that if there were presenting officers it would be more adversarial, but I simply do not see that. In my own experience the presenting officers are helpful; they attempt to help the appellant and to assist the tribunal. I do not think there is any doubt about that. I think the expression is amicus curiae — friend of the court. That is what officials do; one does not come across aggressive officials who are there to defend the decision of the Department. In my experience, the officials are there to assist the tribunal.

The Chairperson:

Mr MacLynn, thank you very much for your time today. There may be some other issues that we may put to you in writing, but, for today's purposes, thank you for coming in.